Taswawasan Sdn Bhd v Ratus Mayang Sdn Bhd & Anor

HIGH COURT (SANDAKAN) — SUIT NO S22–84 OF 2002
YEW JEN KIE JC
3 FEBRUARY 2009

Civil Procedure — Judgments and orders — Judgment in default — Failure to set aside, effect of — Whether defendant presumed to have accepted liability

Contract — Illegality — Defence of — Whether necessary to plead illegality in defence — Plaintiff not privy to alleged illegality — Plaintiff's claim founded on independent, written indemnity — Whether plaintiff's claim enforceable

Contract — Indemnity — Distinction — Distinction between guarantee and indemnity — Written undertaking given by second defendant to plaintiff promising to pay amounts owing on first defendant's failure to pay plaintiff — Whether such undertaking an indemnity — Contracts Act 1950 s 77

The plaintiff claimed against the first defendant for moneys owed in respect of certain works undertaken by the plaintiff on behalf of the first defendant. The plaintiff's claim against the second defendant was based on an undertaking by the second defendant to the plaintiff to pay amounts owing to the plaintiff by the first defendant. Judgment in default of appearance ('the JID') was entered against both defendants. The second defendant successfully set aside the JID but the first defendant never challenged the JID. The second defendant raised various defences in resisting the claim by the plaintiff. The High Court had thus to determine the following issues: (i) whether the plaintiff had any cause of action against the second defendant; (ii) whether the work undertaken by the plaintiff for the first defendant was forbidden and thus rendered the plaintiff's claim illegal and unenforceable; (iii) whether the undertaking signed by the second defendant was a guarantee or indemnity; (iv) whether the undertaking was in fact executed by the second defendant; and (v) the reason why the plaintiff claimed a lower amount against the second defendant than that entered in the JID.

Held, allowing the plaintiff's claim with costs against the second defendant:

(1) The first defendant was legally bound by the JID entered against it. By

not challenging the JID, the first defendant had accepted its liability based on the particulars of claim given by the plaintiff in its amended statement of claim. Further, the plaintiff had adduced ample evidence to show that it had a cause of action against the second defendant (see paras 9 & 16); *BSN Commercial Bank (Malaysia) Bhd v Mesra Venture Sdn Bhd* [2007] 8 MLJ 427 and *Orix Credit Malaysia Sdn Bhd v M/s Belquip Sdn Bhd & Ors* [2007] 3 MLJ 478 followed.

(2) The plaintiff was merely a contractor engaged by the first defendant to carry out the works (extract logs) on its behalf. The second defendant had not shown that the plaintiff had knowledge of and was privy to the illegality. Further, the plaintiff's claim against the second defendant was not founded on illegality but on the written undertaking which was a primary, original and independent undertaking to indemnify the plaintiff and wholly unrelated to the enforceability of the contractual obligation between the first defendant and the plaintiff (see paras 27–28); *Mau Kam Tong & Anor v The Board of Trustees of Yayasan Sabah & Ors* [2005] 8 CLJ 352 followed.

(3) There was no doubt that the undertaking given by the second defendant was to indemnify the plaintiff. By such undertaking the second defendant had promised to save the plaintiff from any losses caused to it by failure of the first defendant to pay the plaintiff the relevant amounts. On a true construction, the second defendant's undertaking was an indemnity. Since the second defendant had undertaken to indemnify the plaintiff, the enforceability of which was independent of the first defendant's liability to the plaintiff, it followed that the second defendant was liable to pay the amounts owed (see paras 38–39 & 42); *Malayan Banking Berhad v Basarudin Ahmad Khan* [2005] 1 MLJ 210 and *KMA Marketing Sdn Bhd v MBf Leasing Sdn Bhd* [2007] 3 MLJ 81 referred.

(4) The witness for the second defendant was an untruthfulness witness. He lied and gave self-serving evidence in order to extricate himself and the second defendant from liability to the plaintiff. The High Court would thus be slow to accept his assertions that he did not know the nature of the documents that he had signed (see paras 57 & 66).

(5) The plaintiff claimed a lower amount since the second defendant had made cash payments and the plaintiff had realised security that the second defendant had provided (see paras 67–68).

[Bahasa Malaysia summary

Plaintif menuntut terhadap defendan pertama wang yang dihutang berkenaan kerja-kerja yang dijalankan oleh plaintif bagi pihak defendan

pertama. Tuntutan plaintif terhadap defendan kedua berdasarkan akujanji oleh defendan kedua kepada plaintif untuk membayar jumlah yang dihutang kepada plaintif oleh defendan pertama. Penghakiman ingkar kehadiran ('PI) dimasukkan terhadap kedua-dua defendan. Defendan kedua berjaya mengetepikan PI tetapi defendan pertama tidak pernah mencabar PI. Defendan kedua mengemukakan beberapa pembelaan bagi menentang tuntutan oleh plaintif. Oleh itu Mahkamah Tinggi perlu menentukan isu-isu berkenaan: (i) sama ada plaintif mempunyai kausa tindakan terhadap defendan kedua; (ii) sama ada kerja yang dijalankan oleh plaintif untuk defendan pertama ditegah dan oleh itu menjadikan tuntutan plaintif menyalahi undang-undang dan tidak boleh dituntut; (iii) sama ada akujanji yang ditandatangani oleh defendan kedua merupakan sekuriti atau tanggung rugi; (iv) sama ada akujanji tersebut sebenarnya disempurnakan oleh defendan kedua; dan (v) sebab-sebab mengapa plaintif menuntut jumlah yang lebih rendah terhadap defendan kedua daripada apa yang dimasukkan dalam PI.

Diputuskan, membenarkan tuntutan plaintif dengan kos terhadap defendan kedua:

(1) Defendan pertama terikat di sisi undang-undang oleh PI yang dimasukkan terhadapnya. Dengan tidak mencabar PI, defendan pertama telah menerima liabilitinya berdasarkan butiran-butiran tuntutan yang diberikan oleh plaintif dalam pernyataan tuntutan yang dipinda. Lebih-lebih lagi, plaintif telah mengemukakan bukti yang mencukupi untuk menunjukkan bahawa dia mempunyai kausa tindakan terhadap defendan kedua (lihat perenggan 9 & 16); *BSN Commercial Bank (Malaysia) Bhd v Mesra Venture Sdn Bhd* [2007] 8 MLJ 427 dan *Orix Credit Malaysia Sdn Bhd v M/s Belquip Sdn Bhd & Ors* [2007] 3 MLJ 478 diikut.

(2) Plaintif hanyalah seorang kontraktor yang dilantik oleh defendan pertama untuk menjalankan kerja-kerja (membalak) bagi pihaknya. Defendan kedua tidak menunjukkan bahawa plaintif mempunyai pengetahuan mengenainya dan mengambil bahagian dalam kepenyalahan undang-undang. Selanjutnya, tuntutan plaintif terhadap defendan kedua tidak berasaskan kepenyalahan undang-undang tetapi berdasarkan akujanji bertulis yang mana merupakan akujanji utama, tulen dan bebas untuk menanggung rugi plaintif dan secara keseluruhannya tidak berkaitan dengan penguatkuasaan tanggungan kontraktual antara defendan pertama dan plaintif (lihat perenggan 27–28); *Mau Kam Tong & Anor v The Board of Trustees of Yayasan Sabah & Ors* [2005] 8 CLJ 352 diikut.

(3) Tidak dapat dinafikan bahawa akujanji yang diberikan oleh defendan kedua adalah untuk menanggung rugi plaintif. Melalui akujanji tersebut defendan kedua telah berjanji untuk menyelamatkan plaintif daripada sebarang kerugian yang disebabkan oleh kegagalan defendan pertama untuk membayar jumlah berkaitan. Dalam tafsiran sebenarnya, akujanji defendan kedua adalah satu tanggung rugi. Memandangkan defendan kedua telah membuat akujanji untuk menanggung rugi plaintif, penguatkuasaan bergantung kepada liabiliti defendan pertama kepada plaintif, ia menunjukkan bahawa defendan kedua bertanggungan untuk membayar jumlah yang dihutang (lihat perenggan 38–39 & 42); *Malayan Banking Berhad v Basarudin Ahmad Khan* [2005] 1 MLJ 210 dan *KMA Marketing Sdn Bhd v MBf Leasing Sdn Bhd* [2007] 3 MLJ 81 dirujuk.

(4) Saksi kepada defendan kedua merupakan saksi yang tidak boleh dipercayai. Dia menipu dan memberikan bukti yang memihak diri sendiri bagi melepaskan dirinya dan defendan kedua daripada liabiliti terhadap plaintif. Oleh itu Mahkamah Tinggi tidak mudah untuk menerima penegasannya bahawa dia tidak mengetahui dokumen apa yang telah ditandatanganinya (lihat perenggan 57 & 66).

(5) Plaintif menuntut jumlah yang lebih rendah memandangkan defendan kedua telah membuat bayaran tunai dan plaintif telah menggunakan sekuriti yang diberikan oleh defendan kedua (lihat perenggan 67–68).]

Notes

For cases on defence of illegality, see 3(2) *Mallal's Digest* (4th Ed, 2009 Reissue) paras 4262–4266.

For cases on distinction between guarantee and indemnity, see 3(2) *Mallal's Digest* (4th Ed, 2009 Reissue) paras 4362–4363.

For cases on judgment in default, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4150–4157.

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Cases referred to

BSN Commercial Bank (Malaysia) Bhd v Mesra Venture Sdn Bhd [2007] 8 MLJ 427; [2007] 9 CLJ 173, HC (folld)

Hong Leong Finance Bhd v Thamilcheleven s/o Palinesamy & Anor [1996] 1 MLJ 351, HC (refd)

KMA Marketing Sdn Bhd v MBf Leasing Sdn Bhd [2007] 3 MLJ 81; [2007] 7 CLJ 552, HC (refd)

Malayan Banking Berhad v Basarudin Ahmad Khan [2005] 1 MLJ 210, CA (refd)

Mau Kam Tong & Anor v The Board of Trustees of Yayasan Sabah & Ors [2005] MLJU 33; [2005] 8 CLJ 352, HC (folld)

Orix Credit Malaysia Sdn Bhd v M/s Belquip Sdn Bhd & Ors [2007] 3 MLJ 478; [2007] 9 CLJ 15, HC (folld)
South East Asia Insurance Bhd v Nasir Ibrahim [1992] 2 MLJ 355, SC (refd)

Legislation referred to
Contracts Act 1950 ss 77, 81
Forest Enactment 1968 s 24
Forest Rules 1969 r 3

Lim Pitt Kong (PK Lim & Co) for the plaintiff.
Sugumar Balakrishnan (Sugumar & Co) for the second defendant.

Yew Jen Kie JC:

[1] The claim of the plaintiff against the first defendant is for the sum of RM1,603,265.73 based on the first defendant's confirmation in writing of the contract works undertaken by the plaintiff on behalf of the first defendant from June 2001 until October 2001.

[2] The claim against the second defendant is premised on the undertaking given by the second defendant to the plaintiff to pay the amount owing to the plaintiff by the first defendant under the respective confirmation of accounts for the months of July to October 2001 pleaded under para 5(a) to (d) of the statement of claim in the event that the first defendant failed to make the respective payments after 45 days credit period was due.

[3] Judgment in default of appearance dated 25 July 2002 was entered against both first and second defendants. However, the judgment against the second defendant was subsequently set aside by the court upon application by the second defendant. The first defendant never challenged the default judgment.

[4] In the plaintiff's opening statement, the plaintiff is asking the court to enter a judgment against the second defendant for the lesser sum of RM1,308,422.11.

[5] In resisting the claim by the plaintiff, the second defendant raised various defences which can be summarised as follows:

(a) whether the plaintiff has cause of action against the second defendant;

(b) whether the illegality of the logging contract has rendered the plaintiff's claim against the second defendant unenforceable in law;

(c) whether the plaintiff had undertaken the logging extraction contract works on behalf of the first defendant for the period from June 2001 until October 2001;

(d) whether the second defendant executed the undertakings; and

(e) the quantum of the claim.

ISSUE ONE

Whether the plaintiff has cause of action against the second defendant

[6] Learned counsel for the second defendant submits that the plaintiff's claim against the second defendant is founded on the second defendant's purported undertaking to pay the purported amount owing to the plaintiff by the first defendant under the purported respective confirmation of accounts for the months of July to October 2001.

[7] It is next submitted that since the plaintiff's pleaded case is that the second defendant is liable to pay to the plaintiff the amounts due and owing to the plaintiff by the first defendant, it is incumbent on the plaintiff to prove, amongst others, in the present suit that the first defendant actually owed the amounts which is said to be due and owing to the plaintiff by the first defendant. It is only upon the plaintiff having proved this fact would the plaintiff then be required to prove that the second defendant is liable for the amounts purportedly due and owing to the plaintiff by the first defendant.

[8] The contention under this head is without merits and I say so for the following reasons.

[9] It goes without saying that the first defendant is legally bound by the default judgment entered against it. By not challenging the default judgment, the first defendant has accepted its liability based on the full particulars of the claim given by the plaintiff in the amended statement of claim.

[10] The authorities on this point are *BSN Commercial Bank (Malaysia) Bhd v Mesra Venture Sdn Bhd* [2007] 8 MLJ 427; [2007] 9 CLJ 173, where Low Hop Bing J (as His Lordship then was) held:

> It suffices for me to observe that the first defendant's failure to mount a challenge on the default judgment means that the first defendant has accepted its liability based on the facilities, thereby putting a halt to any dispute by the first defendant in relation to the facilities.

[11] In *Orix Credit Malaysia Sdn Bhd v M/s Belquip Sdn Bhd & Ors* [2007] 3 MLJ 478; [2007] 9 CLJ 15 (HC), David Wong JC (as His Lordship then was) held:

> There is no requirement on the part of the plaintiff to adduce evidence to prove quantum and the correctness of the amount claimed if the judgment in default against the first defendant is produced … until such time that the judgment in default against the first defendant is set aside he had not discharged the burden of disproving the amount claimed. It should be noted that the fifth defendant as a director of the first defendant until after this trial had started did not take steps to set aside the judgment against the first defendant …

[12] It must be noted that the DW1 as the director of the first defendant has not taken any steps to challenge the default judgment, it is mischievous for him now to say that the plaintiff must prove that the first defendant actually owed to the plaintiff the amount claimed.

[13] In any event, the plaintiff has adduced during the trial exhs P11, P16, P21 and P24, which show that the first defendant had:

(a) examined and confirmed the extraction works done by the plaintiff for the respective months from July 2001 to October 2001;

(b) confirmed the respective timber delivery notes;

(c) confirmed receipts of the delivery notes;

(d) confirmed receipts of the delivery notes are correct; and

(e) confirmed the respective amounts claimed by the plaintiff as correct.

[14] On each of these exhibit, namely, P11, P16, P21 and P24, the second defendant had signed and endorsed its undertaking to the plaintiff in similar terms as follows:

> We, Yung Chen Wood Industry Sdn Bhd undertake to pay the above sum to Taswawasan Sdn Bhd in the event that Ratus Mayang Sdn Bhd fails to make the said payment to Taswawasan Sdn Bhd after 45 days credit period is due. For Yung Chen Wood Industry Sdn Bhd (Company No 247082-M).

[15] The accounts of the plaintiff are audited and reflective of the plaintiff's claim against the first defendant. There is no cogent evidence from the second defendant that the accounts of the plaintiff or the plaintiff's claim against the first defendant are fabricated.

[16] In my judgment, the plaintiff has adduced ample evidence to show that they have a cause of action against the second defendant based on his written undertaking shown in P11, P16, P21 and P24.

ISSUE TWO

Whether the illegality of the logging contract has rendered the plaintiff's claim against the second defendant unenforceable in law

[17] Learned counsel for the second defendant submits at length citing several authorities in support on the issue that illegality is not required to be pleaded in the statement of defence, with which I fully agree.

[18] Learned counsel for the second defendant submits that the consideration for the plaintiff to claim the amount allegedly due and owing to the plaintiff by the first defendant is expressly pleaded to be 'logging extraction contract'.

[19] The plaintiff also pleaded that the second defendant had undertaken to pay to the plaintiff the first defendant's alleged debt due and payable to the plaintiff after the expiry of the 45 days credit period.

[20] It is submitted that the object and consideration of the purported contract as pleaded by the plaintiff is based on the logging extraction contract undertaken by the plaintiff on behalf of the first defendant.

[21] Learned counsel for the second defendant refers to the evidence which shows that the logging extraction undertaken by the plaintiff on behalf of the first defendant was carried out on a parcel of land held under CL095330724 registered in the name of Hap Seng Consolidated Bhd which had been issued Form 1 License To Take Forest Produce ('the license') by the Director of Forestry on 28 March 2001.

[22] Rule 3 of the Forest Rules 1969 stipulates that the licenses for the purpose of s 24 of the Forest Enactment 1968 shall be, inter alia, in Form 1. Hence, s 24 of the Forest Enactment 1968 governs the license issued to Hap Seng Consolidated Bhd.

[23] The licence defines the word 'take' to include the act of felling, cutting, collecting, removing or any other acts as may be authorised by the license. Hence, 'logging extraction contract works' comes within the definition of 'take' in the license.

[24] It is further submitted that the license is personal to holder, citing numerous authorities which held that the licensee is not allowed to assign the rights of the licence to any other party as those rights are personal to licensees.

[25] Learned counsel for the second defendant further submits:

> … the plaintiff's act of carrying out logging extraction and the removal of the logs extracted pursuant to the License is an act forbidden by s 24(6) of the Forest Enactment 1968 and accordingly the plaintiff's claim in this action, which is based on the forbidden act, is illegal and unenforceable. Since the plaintiff's pleaded claim in this action against the second defendant is based on the amounts owing to the plaintiff by the first defendant in connection with the forbidden act, it is humbly submitted that the object and/or consideration of the purported agreement relied by the second defendant in this action clearly comes within the scope of s 24(a) of the Contracts Act 1950, ie an agreement forbidden by a law, in this case s 24(6) of the Forest Enactment 1968. Accordingly, the plaintiff's claim is therefore tainted with illegality by virtue of s 24(a) of the Contracts Act 1950 rendering the impugned agreement void and therefore unenforceable by virtue of s 2(g) of the Contracts Act 1950.

[26] It is my view that the issue raised herein can be dealt with without embarking on detail consideration of the authorities cited and the legality raised.

[27] Suffice it to say that plaintiff was only a contractor engaged by the first defendant to extract logs on their behalf and the second defendant has not shown that the plaintiff had knowledge of and was privy to the alleged illegality.

[28] Moreover, the plaintiff's claim against the second defendant is not founded on illegality but founded on the written undertaking which is a primary, original and independent undertaking to indemnify the plaintiff and wholly unrelated to the enforceability of the contractual obligation between the first defendant and the plaintiff. In *Mau Kam Tong & Anor v The Board of Trustees of Yayasan Sabah & Ors* [2005] MLJU 33; [2005] 8 CLJ 352 (HC) held:

> [1] The agreements under which the logs were purchased were ex facie lawful and the purchasers were never in delicto because they did not know that the agreements formed part of the illegal transactions. The plaintiffs did not seek, nor did they found their claim on the illegal transactions. The defence of illegality was to no avail.

[29] For the reasons stated above, I find that the issue of illegality is a 'red herring' and cannot succeed.

ISSUE THREE

Whether the plaintiff had undertaken the logging extraction contract works on behalf of the first defendant for the period from June 2001 until October 2001

[30] Learned counsel for the second defendant submits that a perusal of the

plaintiff's pleaded case in the amended statement of claim would appear to indicate the second defendant is alleged to be a surety for the alleged liability for the first defendant to the plaintiff. Hence, s 81 of the Contracts Act 1950 should be considered.

[31] In essence, the second defendant contends that Hap Seng Consolidated Bhd had entered into a logging agreement dated 9 June 2002 (exh D2) with K & T Enterprise wherein K & T Enterprise was authorised and allowed to carry out timber extraction activities on Hap Seng Consolidated Bhd's land pursuant to the licence.

[32] Pursuant to the management agreement dated 1 September 2000, K & T Enterprise appointed the first defendant to carry out and perform the obligation of K & T Enterprise under the logging agreement dated 9 June 2000.

[33] By a letter dated 18 July 2001 (D4), K & T Enterprise's solicitors, Messrs Chong & Pang requested the first defendant to quit the land on the ground that the logging agreement dated 9 June 2000 had expired on 8 June 2001 although the correct expiry should be 30 June 2001.

[34] Pursuant to the sale and purchase agreement dated 20 June 2001 (D5), Hap Seng Consolidated sold the land to Tanjung Bahagia Sdn Bhd.

[35] In the light of the matter stated above, learned counsel for the second defendant submits that the plaintiff did not and could not have undertaken the alleged logging extraction contract works on behalf of the first defendant from 1 July 2001.

[36] The argument that the plaintiff's claim is founded on guarantee holds no water upon a close perusal of P11, P16, P21 and P24. It should be noted that on each of P11, P16, P21 and P24, the second defendant had signed and endorsed its undertaking to pay to the plaintiff the sums stated therein in the event that Ratus Mayang Sdn Bhd ie the first defendant failed to make the payment to the plaintiff after 45 days credit period is due.

[37] Section 77 of the Contracts Act 1950 states:

> A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a 'contract of indemnity'.

[38] Although the word 'indemnity' is not used in P11, P16, P21 and P24, there is no doubt that the undertaking of the second defendant was to

indemnify the plaintiff the respective sums stated in these exhibits if the first defendant failed to pay to the plaintiff after 45 days of credit period was due. In other words, by such undertaking the second defendant had promised to save the plaintiff from any losses caused to him by failure of the first defendant to pay the respective sums stated in the exhibits within the credit period.

[39] In my judgment, upon its true construction, the second defendant's undertaking is an indemnity. For examples of indemnity, see *Malayan Banking Berhad v Basarudin Ahmad Khan* [2005] 1 MLJ 210 and *KMA Marketing Sdn Bhd v MBf Leasing Sdn Bhd* [2007] 3 MLJ 81; [2007] 7 CLJ 552.

[40] The nature of a contract of indemnity is described in many authorities and academic writing. In *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355, the then Supreme Court held at p 360D–E:

> In a contract of indemnity, the promisor undertakes an original and independent obligation to indemnify, as distinct fro a contract of guarantee which is a collateral contract by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisse (see *Yeoman Credit Ltd v Latter*).

[41] In *Principles of Banking Law* by Ross Cranston Clarendon Press, Oxford (1997) at p 431 under the caption 'C. Indemnities', the learned author writes:

> The nature of the indemnity in English Law is clear: it is a primary undertaking, in no way dependent for its content or enforceability on the terms of validity of any other contract.

See also: *Hong Leong Finance Bhd v Thamilcheleven s/o Palinesamy & Anor* [1996] 1 MLJ 351; *The Law of Guarantees in Singapore & Malaysia*, Butterworths (2nd Ed, 2003) at pp 52–53 by Low Kee Yangat; Pollock & Mulla on *Indian Contract and Specific Relief Acts* (10th Ed) at Chapter VIII under the caption 'Of Indemnity and Guarantee' at pp 715–718 by Jeevan Lal Kapur.

[42] Given that the second defendant had undertaken to indemnify the plaintiff, the enforceability of which is independent of the first defendant's liability to the plaintiff, it follows that the second defendant is liable to pay the respective sums stated in P11, P16, P21 and P26 to the plaintiff regardless of the first defendant's liability to the plaintiff or even if the first defendant cannot be rendered liable to the plaintiff.

ISSUE FOUR

Whether the second defendant executed the undertakings

[43] It becomes clear in the course of the trial that Wang Lai Ping (WLP) does not dispute that the signatures appear in P11, P16, P21 and P24 belonged to him and that he signed those signatures in the presence of PW2.

[44] What is in dispute is the place where P11, P16, P21 and P26 were signed. PW2 testified that these exhibits were signed in the office of the first defendant while WLP claimed that they were executed in the office of the plaintiff.

[45] There is also dispute on whether the contents of P11, P16, P21 and P26 were explained to WLP before he put his signatures on those documents. PW2 agreed in cross-examination that he prepared P11, P16, P21 and P26 and he told WLP to sign if he agreed. He disagreed that WLP signed these exhibits in the plaintiff's office and insisted that they were signed in the second defendant's office. He disagreed that WLP signed P11, P16, P21 and P26 thinking that he was signing them in his capacity as a director of the first defendant, not as a director of the second defendant. He disagreed that he never told WLP the contents of P11, P16, P21 and P26 and that WLP was not aware of the contents of the exhibits. He said that he did tell WLP the contents of P11, P16, P21 and P26. He agreed that the two signatures appearing in each exhibit was signed one after another ie after WLP had signed on the top, he was asked to sign at the bottom. According to PW2, WLP is not very good in English. However, he can recognised his name, differentiate between all the companies owned by him and read figures, numbers, dates and so on.

[46] WLP, on the other hand, gave evidence that the only language he is able to speak, write, read and understand is Mandarin. He is unable to speak, write, read and understand any other language, including the English language.

[47] WLP further testified that on or about 24 October 2001, PW2 came to see him at the second defendant's office and informed him that the first defendant under the previous management of Khoo Tau Guan allegedly owed his company some monies and then he produced the impugned document, namely, P11, P16, P21, P24, P41 and P42 and requested him to sign them for accounting purposes as he was now the director of the first defendant.

[48] WLP further testified that PW2 also showed him a copy of the notice

of sale issued by the court and told him that if he signed exhibit (P11, P16, P21, P24, P41 and P42) impugned documents, the plaintiff could recover from Ribuwajar Development Sdn Bhd, the execution creditor, the monies allegedly due and payable by the first defendant.

[49] He accepted the explanation given by PW2 because he knew that Ribuwajar Development had obtained judgment against the first defendant and they intended to auction the first defendant's assets.

[50] He therefore agreed to sign the impugned document ie P11, P16, P21, P24, P41 and P42 in his capacity as a director of the first defendant. He signed where PW2 indicated to him where and he have signed honestly believing that the impugned documents related to monies allegedly owing by the first defendant to the plaintiff company.

[51] According to WLP, at no material time did PW2 inform him or explain to him that he was signing the impugned documents ie P11, P16, P21, P24, P41 and P42 for and on behalf of the second defendant and that by signing them, the second defendant was accepting responsibility for the alleged debts of the first defendant to the plaintiff.

[52] WLP further testified that on 15 April 2002, PW2 produced, amongst others, P44 and requested him to sign the same without explaining the contents except to say that P44 was merely consequential to the earlier documents WLP had signed on 24 October 2001. He (WLP) accordingly signed.

[53] It is to be noted that although the second defendant put to PW2 that P11, P16, P21 and P26 were signed in the plaintiff's office, WLP testified in examination in chief that PW2 came to see him in the second defendant's office and then produced P11, P16, P21 and P26 and asked him to sign those documents for accounting purpose.

[54] Learned counsel for the second defendant submits that it is an uncontroversial fact that WLP is a Taiwan national, the evidence of WLP of how he came to sign exhs P11, P16, P21, P24, P44 and P45 is credible and ought to be accepted by the court as there is uncontroversial fact that WLP does not speak, read, write or understand the English. In the circumstance how is he capable of comprehending the contents of P11, P16, P21, P24, P44 and P45 in order to decide whether he agreed with it when PW2, who had the duty to explain the contents of the documents to WLP, had not done so and he merely told WLP to sign where he indicated to WLP.

[55] I find WLP to be an untruthful witness. It may be recalled WLP in

answer to questions 203 and 204 in cross-examination agreed that since he cannot read, recognise or write any English word as he so claimed, that in his daily operations of the first and second defendants where documents were written in English, he would require them to be translated to him in mandarin, and that for documents which were written in English, he would not act on them unless they were translated to him in mandarin and only after he had satisfied that he understood them in Mandarin after the translation from English.

[56] In the light of his unequivocal answers to questions 203 and 204, it highly improbable that PW2 had not explained the contents of P11, P16, P21, P24, P44 and P45 to him before he signed them.

[57] WLP readiness to lie through his teeth and to give self-serving evidence in order to extricate himself and the second defendant out of liability to pay the plaintiff is clearly exposed in the following evidence adduced in cross-examination where he was trying to feign illiteracy in English:

Q190: What about numbers like 1, 2, 3, 4 like that, do you understand that in English?

A: No.

Q192: Is it correct that you don't understand, read, speak or recognise a single English word?

A: Correct. I only know Mandarin.

Q193: What is your name in English?

A: I have never written my name in English, I write my name in Chinese.

Q194: Do you know how to spell your name in English?

A: No.

Q195: Do you know how to write your address in English?

A: Impossible, I don't know.

Q196: Can you recognise your name and address in English?

A: No.

Q197: What is the name of the first defendant's company?

A: [Witness pronounce the name of the first defendant in Mandarin].

Q198: Can you recognise the name of the first defendant's Company if written in English?

A: No.

Q199: Can you recognise the name of the second defendant if written in English? **A**

A: No.

Q200: Is it correct that you cannot even read A, B, C?

A: Correct. **B**

Q201: Can you recognise your personal name if written in English?

A: No.

Q202: Are you saying that you are 100% illiterate in English?

A: Correct. **C**

Q203: Since you cannot read, recognise or write any English word as you so claimed, is it correct that in your daily operations of the first and second defendants where documents are written in English, you will require than to be translated to you in Mandarin? **D**

A: Correct.

Q204: Is it correct that for documents which are written in English, you will not act on the same unless they are translated to you in Mandarin and only after you have satisfied that you understand them in Mandarin after the translation from English? **E**

A: Yes.

Q205: Referring to exhibit P11 at page 23 of Bundle B, can you tell the Court whether the two signatures written in Chinese on this document belong to you?

A: Yes. **F**

Q206: I put it to you that the top signature in Chinese appearing under the company name of Ratus Mayang Sdn Bhd was signed by you in your capacity as a director of this company. Do you agree?

A: Agree. **G**

Q207: Do you agree with me that you only signed your signature as a director of Ratus Mayang Sdn Bhd after Mr Lo Chee Kin (PW2) has translated the contents of exhibit P11 to you in Mandarin?

A: I became a director of Ratus Mayang Sdn Bhd on 22nd May 2001. Lo Chee Kin came to Yung Cheng Wood Industry office on 24th October 2001 and said to me that this is the amount due to his company prior to I became the director and he asked me to sign. **H**

Q208: I put it to you that PW2 has translated the contents of exhibit P11 to you before you signed. **I**

A: No

Q230: What do you do with the second defendant's products?

A: I sold them to Taiwan.

Q231: Do you sell the products to any other country other than Taiwan?

A: Very rarely to other country.

Q232: What are these other countries?

A: Thailand.

Q233: Are the dealings between the second defendant and Thailand conducted in English?

A: Yes, but I was not one who did the dealing. I sub-contracted it to others.

Q234: How did you do that?

A: There were people who specially deal in this kind of business. I communicated with them in Mandarin.

Q235: Does the second defendant have any employees who are conversant in English?

A: No.

Q236: Are you suggesting that the second defendant does not have any employee who can speak and write and understand English?

A: Yes, that is correct.

Q237: Do you employ any local Sabahans or Malaysians in the second defendant's business under their payroll?

A: No. The office management was run by Taiwanese and the factory workers were Indonesians.

Q238: Are you saying that the second defendant does not employ a single Malaysian as their employees?

A: Correct.

Q239: Are you suggesting that the second defendant has no employee under its payroll who can write speak and understand English?

A: No, it does not have.

Q240: I put it to you that you are not telling the truth because it is impossible for the second defendant to run its business operation in Sabah or in Malaysia without a single employee who is conversant in English.

A: I disagree.

Q241: What is your level of education?

A: Up to Primary Six.

Q243: Referring to paragraph 6 of your witness statement. I put it to you that what you have said is not true because you do understand, recognise, speak and write some English given your years of experience as a businessman and in managing the second defendant's timber operations with a factory's approximate costs of RM80 million.

A: I disagree.

[58] A question is posed: if it were true that PW2 had not explained the contents of the impugned documents to WLP but merely told him that the documents were for accounting purpose to enable the plaintiff to make a claim in the execution proceeding by Ribuwajar Sdn Bhd, why would the second defendant make cash payment of RM10,000 on 14 December 2001 and RM20,000 on 9 February 2002 to the plaintiff on behalf of the first defendant for the first defendant's account with the plaintiff (see exhs P26 and P27 at pp 43–44 respectively in bundle B)?

[59] WLP explained that the above cash payments of RM10,000, RM20,000 and RM50,000 were cash advance made by the second defendant on behalf of the first defendant to the plaintiff for logs to be supplied to the first defendant's sawmill.

[60] The explanation of WLP cannot be believed because it is not substantiated by exhs P27 and P28 which clearly state that they were payments made on behalf of the first defendant for the account of the plaintiff. Further, there is no evidence on the existence of any contract for the sale or supply of any alleged logs by the plaintiff to the first defendant or the plaintiff had set off the alleged advances and if there is none, the second defendant to recover the alleged advance from the plaintiff.

[61] Further, if it were true that PW2 had not explained the contents of the document to WLP but merely told WLP that the documents were for accounting purpose to enable the plaintiff to make a claim in the execution proceeding by Ribuwajar Sdn Bhd, why did the second defendant pledge and transfer ownership of their vehicles as per exhs P33, P36, P37 and P41 to the plaintiff as security for the second defendant's liability under P11, P16, P21, P24?

[62] It is PW2's testimony that when the above vehicles were pledged and transferred to the plaintiff, the second defendant orally agreed with the plaintiff that if the second defendant should fail to abide by its undertaking, the plaintiff would be entitled to sell the vehicles and utilise the proceeds thereof to set-off the outstanding balance due and owing to the plaintiff (see PW2's Q/A 42).

[63] WLP explained that the second defendant had sold the 'equipment' referred to in P33, P36, P37 and P39 to the plaintiff and it was simply a sale and purchase transaction between them (see DW1 statement paras 34–35).

[64] However, in cross-examination he testified as follows:

> Q270: Referring to paragraph 35 of your witness statement, where is your evidence to back up your claim that the second defendant has received the alleged purchase price for the alleged sale of the second defendant's equipments to the plaintiff?
>
> A: He said he would help me to sell those equipments and he would give me the money after the equipments had been sold.

[65] The contradictory answers just mentioned goes to show WLP have no qualm to change his story if the questions turn unfavourable to him. I disbelieve that the transfers of the vehicles were sale and purchase transaction as alleged as there is no evidence of any selling price given by the second defendant to the plaintiff or that the second defendant had demanded for any alleged selling price from the plaintiff.

[66] When all the above facts are considered together, I am slow to accept WLP's assertion that he did not know what he was signing because PW2 had not explained the contents of P11, P16, P21, P24, P44 and P45 and that PW2 told him to sign those documents for accounting purpose only.

ISSUE FIVE

The quantum of the claim against the second defendant

[67] On the issue of quantum against the second defendant, namely, why the plaintiff is claiming against the second defendant for a lower judgment sum to be entered against the second defendant than the amount in the default judgment, the plaintiff had explained that pursuant to the undertaking, the second defendant had made cash payment of RM10,000 and RM20,000 (see P26 and P27 respectively).

[68] The second defendant had also pledged and transferred four vehicles (see P33, P36, P37 and P41) as security for the second defendant's liability in discharging the debts of the first defendant if defaulted by the first defendant.

[69] The plaintiff explained that sometime in Year 2003 and 2004, when the plaintiff did not receive any further payment from any of the defendants, they proceeded to sell the vehicles, and fetched a disposal price of RM147,000.

[70] Finally, as at 24 April 2004 (exh P7), the total outstanding balance due and owing to the plaintiff is the sum of RM1,308,422.11 only calculated as follows:

Balance as at 8 February 2002 (see exh P7)	RM1,603,265.73
Less: Disposal price of the vehicles	RM147,000
Less: Rateable distribution claim of proceeds received for the account of the first defendant	RM147,843.62
(See: exhs P1 and P2: PW1 statement)	
	RM1,308,422.11

CONCLUSION

[71] For all the reasons stated above, I am satisfied that the plaintiff has proved its claim on the balance of probability. Accordingly I order that judgment be entered against the second defendant in the sum of RM1,308,422.11 with interest thereon at 8%pa from 1 May 2002 until full and final settlement. Cost of this action shall be to the plaintiff to be taxed unless agreed.

Plaintiff's claim allowed with costs against the second defendant.

Reported by Andrew Christopher Simon